IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION
CASE NO. 1:13-CV-00304-MR-DLH

HOMETOWN SERVICES, INC.,	)
	)
Plaintiff,	)
	)
v.	)
	)
EQUITYLOCK SOLUTIONS, INC.,	)
	)
Defendant.	)

PLAINTIFF, HOMETOWN SERVICES, INC.'S, MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

I. Introduction

Plaintiff, Hometown Services, Inc. ("Hometown"), by and through its undersigned counsel, respectfully submits this Memorandum of Law in opposition to defendant, Equitylock Solutions, Inc.'s ("EquityLock"), Motion to Dismiss.

As defendant acknowledges, this is in part a contractual matter that morphed into something much bigger. While the defendant pronounces that the Complaint's non-contractual claims are full of sound and fury and signify nothing, the Complaint sets out well-pleaded allegations that clearly support each of its claims.

II. Factual Background

Hometown develops and provides integrated document and transaction management systems to companies and individuals involved in real estate transactions. EquityLock is a financial services company that offers real property owners protection against future declines in real estate market values. In other words, EquityLock conceptually tries to help its customers lock in the equity in their real estate.

Hometown and EquityLock representatives started discussing a partnership in 2011. At that time, Hometown was operating a support center in Tampa. The center facilitated and coordinated a variety of issues and component transactions with realtors, banks, appraisers, buyers, sellers, title companies, etc. in real estate and banking transactions. Hometown's developers had years of experience in conducting legal work for those types of transactions and in developing web-based management systems and support for large scale and multifaceted transactions.

EquityLock reached out to Hometown and began touting its business and potential growth position. EquityLock needed Hometown's expertise, system management, and contacts in the industry, or it was going to fail. In order to make a possible relationship seem more beneficial to Hometown, EquityLock misrepresented its then prospects for financial success, for example, by stating often that it had an extremely large opportunity with a project it called CORRE, which had a website located at www.corre.com. EquityLock also touted its participation with national real estate franchises and other large entities. The point was EquityLock made these material misrepresentations to induce Hometown into working with it by making EquityLock and its officers seem like they were well-connected, verging on success, and had sound financial backing.

On or about January 10, 2012, Hometown and EquityLock entered into a Joint Venture Agreement (the "JV Agreement"). The JV Agreement, which is attached as Exhibit A to the Amended Complaint, created a new company for the purpose of providing exclusive sales and support services, via the creation of a new support center, to their respective customers and potential customers. After entering into the JV Agreement, Hometown closed its support center in Florida at EquityLock's request, in order to exclusively, as per the JV Agreement, focus on the new responsibilities requested and required for the new entity. Hometown relied upon the consideration of the JV Agreement and other misrepresentations of EquityLock when it closed its then operating support center.

The parties immediately began executing the terms of the JV Agreement, including the creation of the new entity, EH Venture, Inc. ("New Entity"). The JV Agreement provided various things, including: a) the New Entity would focus on EquityLock's requirements for the first 3 months; b) the New Entity would be the exclusive provider of sales and support services, among other services, for the parties; c) the New Entity would establish a physical location in Asheville, NC, for the operation of the support center; d) the New Entity would hire employees, procure equipment, and procure necessary services to execute its objectives; and e) *EquityLock would fund all operational costs until there were sufficient revenues to fund costs, including the development of plaintiff's related services.* In furtherance of the JV Agreement, the parties met via telephone conference multiple times each week for approximately one year.

EH Venture leased office space at 138 Charlotte Street, Suite 201, Asheville, North Carolina, 28801, for the purpose of locating the support center. EH Venture acquired services, furniture, equipment, and employees for the purpose of facilitating the objectives set forth in the JV Agreement, and installed these resources into the Charlotte Street office at the direction and under the supervision of Hometown.

Initially, EquityLock paid several of the specified fundings as agreed; however, it then began to be late and erratic in making its required deposits to EH Venture of which a portion was to pay certain operating expenses of Hometown. EH Venture, through Hometown, continued to perform services for EquityLock after EquityLock stopped funding, because EquityLock continued to make specific statements, by and through TJ Agresti, Ted Rusinoff, Tim McCarthy, and Mark Dameron, that EquityLock would be receiving funding and assurances that EH Venture would receive its operating funds upon EquityLock's receipt of its funds.

Upon information and belief, EquityLock received its expected funding in early 2013. Not only did it fail to inform Hometown, it did not catch up the missed payments nor resume its monthly contractual payment obligations.

On May 31, 2013, EquityLock informed Hometown that it had completed its expected "Series B" funding which it had been promising would be used to continue its obligations to Hometown, and that it and its investors, who control the company via their positions on the board of EquityLock and otherwise, had decided not to pay Hometown. The only reason given by EquityLock for not paying as promised was for the financial benefit of EquityLock and its investors.

EquityLock used ongoing false promises and material misrepresentations to mislead Hometown as to its intentions and to shield its intentions to breach the JV Agreement. EquityLock, through Mark Dameron, even spoke with EH Ventures' landlord to arrange for the lease agreement to continue in order to keep plaintiff working; however, defendant did not intend to honor its obligations to the landlord nor to plaintiff and such was deceptive conduct on the part of EquityLock to continue to receive the benefits provided by Hometown.

As stated at paragraph 46 of the Amended Complaint, "[p]rior to filing this action, Hometown made demand pursuant to paragraph 9 of the JV Agreement; however, EquityLock did not respond." While the Amended Complaint does not attach the May 31, 2013 letter from Hometown to EquityLock, EquityLock (even within a motion to dismiss) attaches Hometown's letter demanding that the parties follow the Agreement to resolve EquityLock's breach; however, EquityLock did not respond at all, even while it sat on the funding it had held out to Hometown as an inducement to continue with its performance of obligations benefiting EquityLock knowing it never intended to use any of those funds as promised. Contrary to its contractual obligations and contrary to multiple, material misrepresentations to multiple parties, EquityLock is not funding the support center, or performing any of its obligations, yet it is continuing its operations.

III. Standard of Review

To survive a motion to dismiss "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937 (quoting *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 570 (2007)). *See also E.I. du Pont de Nemours & Co.* v. *Kolon Indus.*, 637 F.3d 435, 440 (4th Cir. 2011). Determining whether Hometown's complaint meets the Rule 8 requirements and states a plausible claim for relief is "a context-specific task," *Francis v. Giacomelli*, 588 F.3d 186, 193 (4th Cir. 2009), which requires the Court to assess whether the factual allegations set forth in the amended complaint are sufficient "to raise a right to relief above the speculative level." *Twombly* at 555. The Complaint must contain "'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Id.* Ultimately, a court should not dismiss a complaint for failure to state a claim unless the complaint fails to include "plausible grounds" for relief. *Id.* Hometown's Amended Complaint satisfies the pleading requirements set out in FRCP 8 and the threshold requirements established in *Iqbal* and *Twombly.*

In order to state a claim for fraud under North Carolina law, a party must allege a false representation or concealment of a material fact that: (1) was reasonably calculated to deceive; (2) was made with the intent to deceive; (3) did in fact deceive the plaintiff; and (4) resulted in damages to the party. *Anderson v. Sara Lee Corp.*, 508 F.3d 181, 189 (4th Cir. 2007). The plaintiff must also demonstrate a reasonable reliance on the false representations. The facts as set forth in Hometown's Amended Complaint clearly meet each of the criteria for a fraud claim in North Carolina to satisfy the pleading standards of FRCP 9(b) and its claim for intentional misrepresentation should survive EquityLock's Motion.

IV. Argument

Contractual and non-contractual claims may be brought in the same matter, and if pled appropriately as here, they shall survive a motion to dismiss. Defendant makes two sweeping, general arguments: first, the Complaint should be dismissed pursuant to paragraph 9 of the parties' contract; or second and alternatively, some of the counts in the Complaint should be dismissed because "[t]his is a simple contract case" (defendant's Memorandum at p. 1). Not only is the Complaint crystal clear about Hometown's demand pursuant to paragraph 9 of the parties' contract and defendant's failure to respond to that demand, the Complaint's 80 paragraphs set forth well-pleaded allegations supporting each of Hometown's claims.

A. Plaintiff Met the Requirements of Paragraph 9 of the JV Agreement Prior to Filing its Complaint

Oddly, defendant's lead argument to this Court is that Hometown failed to comply with paragraph 9 of the JV Agreement that requires certain steps be taken before a party may file an action. Paragraph 46 of the Complaint states as follows: "**Prior to filing this action, Hometown made demand pursuant to paragraph 9 of the JV Agreement; however, EquityLock did not respond**" (emphasis added). That clear and pithy allegation, which is taken as true for this motion, addresses a specific requirement of the JV Agreement and explains why the case is now before a court, i.e. defendant further breached the JV Agreement by not responding to Hometown's request. Hometown requested, but could not compel, a good faith response, much less a mediation, when defendant simply ignored the written request.

Even more interestingly, defendant attaches an exhibit to its Motion to Dismiss (which plaintiff's counsel sent to defendant's counsel prior to the filing of the instant Complaint) which demonstrates, even if ***outside the pleadings*** and four corners of the Complaint, that Hometown did exactly what it pled. Hometown made demand in writing, pursuant to paragraph 9 of the JV Agreement, on May 31, 2013. Defendant did not respond in any manner. Plaintiff commenced this action more than 30 days later, in October, 2013. Defendant cannot breach further its obligations under the JV Agreement, specifically here meaning its breach of paragraph 9 in failing to cooperate or even respond to a written notice and request to "work in good faith to reach a resolution . . . ."

Defendant's primary argument is that this entire case should be dismissed or stayed, because when it failed to respond to Hometown's written demand under paragraph 9, and further breached the JV Agreement, Hometown never acquired the ability to file suit. If such an argument were accurate, then defendant need simply sit back and ignore Hometown's written demands and Hometown would never be entitled contractually to seek court relief.

B. Each Count in the Complaint is Well-Pleaded and States a Claim Upon Which Relief May be Granted

After its primary argument that Hometown should be precluded from bringing any claim, even after making a written demand which was ignored by defendant as specifically pled at paragraph 46 of the Amended Complaint, defendant concedes that Hometown's claims for breach of contract, and alternative claim for unjust enrichment, are valid claims for the purposes of its current motion; however, it requests that Hometown's remaining claims be dismissed. With limited reference to the actual allegations in the Amended Complaint, defendant summarily challenges each of the remaining claims. Simply put, each of the Complaint's claims sets out the requirements for each claim, tracks statutory elements where appropriate, and each is based on the specific facts and aggravating circumstances alleged throughout the 80 paragraphs of the Complaint.

1. **Hometown's Intentional Misrepresentation Claim**

Defendant incorporates several standard challenges to Hometown's intentional misrepresentation claim, including that it fails to meet the "particularity-pleading" requirement under Rule 9(b). Rule 9(b) states that, "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."

The circumstances constituting fraud are established in Hometown's Amended Complaint. Contrary to defendant's assertion, the facts do set out the "who, what, when, where and how" in paragraphs such as 11, 12, 20, 31, 32, 38, 39, 41 and 42 and meet each and every requirement of pleading fraud in North Carolina. More specifically EquityLock induced Hometown to enter into the JV Agreement, used ongoing false promises to mislead Hometown (and the landlord) as to its intentions to breach the JV Agreement, and continued to receive the benefit of the services provided by Hometown long after it decided to scrap the JV Agreement. Plaintiff reasonably relied upon all such statements by EquityLock, both before and after entering in the JV Agreement, to its detriment and such was deceptive conduct on the part of EquityLock. Hometown reasonably relied upon the misrepresentations because it kept working and providing services to the defendant.

The facts of the case cited by defendant, *Rahamankhan Tobacco Enterprises Pvt. LTD v. Evans MacTavish Agricraft, Inc.*, 5:11-CV-650-D, 2013 WL 5493309 (E.D.N.C. Oct 1, 2013) are clearly distinguishable from the underlying facts in this case. In that case, the plaintiff simply entered into a separate contract with a third party and did not disclose that information to defendant. It had no obligation to do so and did not make any false representations to MacTavish regarding the contract. In contrast, EquityLock made repeated false representations to Hometown both before and after entering into the JV Agreement which Hometown relied on to its own detriment. Even after EquityLock, and its investors, had made a decision to breach to JV Agreement, EquityLock's representatives continued to assure Hometown additional funding was forthcoming and continued to benefit from Hometown's services. These actions are clearly an aggravating factor.

The facts in this case are not dissimilar to those in the matter of *Oestreicher v. American Nat'l Stores, Inc.*, 209 N.C. 118 (1976) where the Court determined the allegations of fraud were obvious "from the manner in which the breach is alleged." *Oestreicher* at 136. In that case the plaintiff alleged the defendant intentionally understated its gross sales in order to reduce rental due under a lease agreement. The Court ultimately agreed these overall allegations brought the plaintiff within the philosophy set out in *Swinton v. Realty Co.*, 236 N.C. 723, 73 S.E.2d 785 (1953) where the Court found:

> [W]e think the rule is that the facts in each case must determine whether the fraudulent representations alleged were accompanied by such acts and conduct as to subject the wrongdoer to an assessment of additional damages, for the purpose of punishing him for what has been called his 'outrageous conduct.'

*Oestreicher at 134 (*citing *Swinton* at 726, 787). The court went on to state as follows:

> In the so-called breach of contract actions that smack of tort because of the fraud and deceit involved, we do not think it is enough just to permit defendant to pay that which the lease contract required him to pay in the first place. If this were the law, defendant has all to gain and nothing to lose. If he is not caught in his fraudulent scheme, then he is able to retain the resulting dishonest profits.

Oestreicher at 136.

In *Unifour Constr. Servs. v. Bellsouth Telcoms.*, 163 N.C. App. 657, 594 S.E.2d 802, (2004), the Court stated as follows:

> Our Supreme Court has held (1) that the statement of an intention to perform an act, when no such intention exists, constitutes misrepresentation of the promisor's state of mind, an existing fact, and as such may furnish the basis for an action for fraud if the other elements of fraud are present and (2) that proof of fraud necessarily constitutes a violation of the statutory prohibition against unfair and deceptive acts.

Unifour at 666 (citations omitted). In this case, EquityLock not only made false representations to Hometown which resulted in the parties entering into the JV Agreement, but it continued its deceitful behavior by promising to meet the terms of the contract for many months when it knew it was not going to do so.

EquityLock also argues Hometown's fraud claim is based on "information and belief" and cites a single paragraph from the Complaint in support of this argument. Defendant ignores the numerous specific references throughout the Complaint, including those in the paragraphs identified above. Again, Hometown's pleading clearly meets the requirements of Rule 9(b). All of the questions (who, what, when, where and why) are easily answered by a review of the Complaint.

Defendant argues that the economic-loss rule should prohibit recovery on certain of plaintiff's claims. The economic-loss rule is a theory that essentially prohibits extra-contractual damages outside the confines of a contract. However, each of plaintiff's non-contractual claims has a specific set of allegations that are deemed true for these purposes that set forth the elements necessary to plead the non-contractual claims contained in the Complaint. Without the additional aggravating circumstances included in the Complaint the economic-loss rule might come into play but for all the reasons set forth in each separate section, each cause of action stands on its own.

2. **Hometown's Unfair and Deceptive Trade Practices Claim**

Defendant essentially repeats the same arguments for dismissal of this claim as in the previous claim. Contrary to EquityLock's position that there were no aggravating factors, the Amended Complaint clearly demonstrates there were. Not only did the representatives for EquityLock make numerous false representations to Hometown, they even spoke directly to the landlord for the office of EH Ventures to make arrangements for continuation of the lease agreement so Hometown could continue to work. Multiple intentional misrepresentations to multiple people goes well beyond a breach of contract. These actions establish a clear violation of the UDTPA in addition to the defendant's breach of contract. *See e.g.*, *Mosley & Mosley Builders, Inc. v. Landin, Ltd.*, 97 N.C. App. 511, 519-520, 389 S.E.2d 576 (1990) ; *Foley v. L&L International, Inc.*, 88 N.C.App. 710, 713-714, 364 S.E.2d 733 (1988).

A UDTPA claim based on a breach of contract will only survive a Rule 12(b)(6) motion if a plaintiff alleges "substantial aggravating circumstances attending the breach. . . . To find such factors one would probably need to demonstrate deception either in the formation of the contract or in the circumstances of its breach." *Bartolomeo v. S.B. Thomas, Inc.*, 889 F.2d 530, 535 (4th Cir. 1989) (citation omitted).

This Court in *Oxley v. Asplundh Tree Expert Co.*, 2006 U.S. Dist. LEXIS 42092 (W.D.N.C. May 16, 2006) found the actions of the defendant were substantially aggravating both in the formation of the contract and its breach. In *Oxley* the defendant not only knowingly breached the contract but made deceptive representations to plaintiffs when forming the contract knowing it had no intention to abide by its terms. Defendant then went on to breach the contract knowing their conduct was unlawful. In this case EquityLock entered into the JV Agreement with Hometown based on numerous false representations, entered into a lease agreement, hired employees and incurred expenses for the purported reasons of furthering that Agreement and continued to make false statements to Hometown to induce it to continue its performance under the Agreement. This continued for many months even after EquityLock, as a manifestation of assent among its executives and its controlling investors, had decided not to meet its obligations under the contract for their own benefit and gain. These actions establish a clear violation of the UDTPA as in *Oxley*.

3. Hometown's Trade Secret Claim

Hometown's claim under N.C.G.S. section 66-152 et seq. survives defendant's challenge. Defendant makes partial reference to **one** paragraph in the Complaint and claims that such does not set forth a claim. While paragraph 63 does contain specific allegations sufficient to withstand a motion to dismiss, defendant fails to point to paragraphs 43, 44, 45, 64, 65, and 66 in making its argument that Hometown did not say enough to set forth a trade secret claim.

Customer and client information and lists, goodwill, client development, system development and programming information, intellectual property in the form of detailed flow charts, and the networking of the support center, etc. are part of what defendant wrongfully acquired from Hometown. The Complaint goes on to set forth information relating to the secrecy measures undertaken by Hometown (paragraph 65) and the confidential nature of the information. The scope of the violations and misappropriations go beyond the scope of the parties' agreement.

In one of the cases cited by defendant, *GE Betz, Inc.*, 2013 WL 6236374, the Court determined customer lists meet the criteria of trade secrets. The Supreme Court has also agreed customer lists constitute trade secrets. See *Sunbelt Rentals, Inc. v. Head & Engquist Equip., L.L.C.*, 174 N.C. App. 49, 620 S.E.2d 222 (2005).

Again, the economic loss rule does not prevent pleadings with different causes of action.

4. Hometown's Conversion Claim

Defendant claims Hometown's conversion claim should fail because it is not specific enough and because Hometown did not demand that defendant return the property prior to filing suit.

First, the Complaint sets forth specific items, e.g. client and customer information, human resources, intellectual property, and the physical infrastructure of the support center which defendant has converted. Second, Hometown made demand IN WRITING. In addition to paragraph 46 of the Complaint, defendant attached Hometown's letter dated May 31, 2013 demanding that the parties work in good faith to resolve the issues between them. Defendant did not respond. Hometown expected this demand for a resolution, pursuant to the JV Agreement, to encompass all of the issues between the parties. When EquityLock failed to respond Hometown had no choice but to pursue each of its claims by filing suit. There is nothing that requires a second, separate demand for the property EquityLock has converted for its own purposes.

5. Hometown's Request for Injunctive Relief

Hometown's request for injunctive relief is just that, a request for injunctive relief. It is separately set forth in Count Six, and incorporated in Hometown's prayer for relief, in order to specifically allege the elements necessary to request and properly claim injunctive relief. That is all that section does. The section contains the same "Wherefore" clause which simply repeats the general relief sought. Injunctive relief is remedial, and that is what that separate section requests, and it is not intended otherwise. Part of the problem is that defendant continues to use

Hometown's systems, client information, etc., and Hometown needs an injunction to help stop that, as stated at paragraph 66 of the Complaint.

V. **Conclusion**

For the foregoing reasons plaintiff Hometown Services, Inc. respectfully requests that defendant's Motion to Dismiss be denied.

RESPECTFULLY SUBMITTED this 30th day of January, 2014.

Jeffrey W. Norris & Associates, PLLC
Attorneys for Plaintiff,
Hometown Services, Inc.

By: /s/ Jeffrey W. Norris
Jeffrey W. Norris
N.C. Bar No. 29663
177 N. Main Street
Waynesville, NC 28786
(828) 452-2221 (Telephone)
(828) 452-3534 (Telecopy)
jnorris@norrisandassoc.com

CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2014, I electronically filed the foregoing Memorandum of Law in Opposition to Defendant's Motion to Dismiss with the Clerk of the Court of the United States District Court for the Western District of North Carolina using the CM/ECF system which will send notification of such filing to the following counsel for defendant:

Wyatt S. Stevens, Esq.
John D. Noor, Esq.
Roberts & Stevens, P.A.
P.O. Box 7647
Asheville, NC 28801
wstevens@roberts-stevens.com
jnoor@roberts-stevens.com
Attorneys for Equitylock Solutions, Inc.

/s/ Jeffrey W. Norris